



# **Addressing Past Wrongs**

## **Indigenous Peoples and Protected Areas: The Right to Restitution of Lands and Resources**



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Addressing Past Wrongs  
Indigenous Peoples and Protected Areas:  
The Right to Restitution of Lands and Resources

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Cover pictures

Top: Rwanda: Nyungwe Forest - Dorothy Jackson

Centre: South Africa: Deputy President Thabo Mbeke at the †Khomani San land claim ceremony - SASI CRAM Archive

Bottom: Cameroon (south-west): Fisherman on Ntem River, looking across to Dipikar Island, now part of Campo Ma'an National Park - John Nelson

Production: Lindsay Hossack

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# Contents

<b>Executive Summary</b>	<b>3</b>
<b>I Introduction</b>	<b>7</b>
<b>II Indigenous Peoples' Rights to Lands and Natural Resources</b>	<b>11</b>
A Universal Human Rights Instruments	11
1 International Covenant on Civil and Political Rights	11
2 Convention on the Elimination of All Forms of Racial Discrimination	12
3 International Labour Organisation Convention No. 169	13
B Regional Instruments	13
1 Inter-American Instruments	13
2 The African Charter on Human and Peoples' Rights	15
3 CARICOM Charter of Civil Society	15
C Emerging Rights (instruments currently awaiting approval)	16
<b>III Restitution in International Human Rights Law</b>	<b>19</b>
A General Principle	19
B Restitution of Indigenous Peoples' Lands and Resources	20
<b>IV Protected Areas and Restitution: Examples</b>	<b>25</b>
A ‡Khomani San (South Africa)	25
B Australia (Various)	26
C Mt. Aoraki/Cook National Park (Aotearoa-New Zealand)	28
D Timbisha Shoshone – Death Valley National Park (United States)	29
E Havasupai/Grand Canyon National Park (United States)	31
F Isiboro-Sécure Indigenous Territory and National Park (Bolivia)	32
<b>V Conclusions and Recommendations</b>	<b>33</b>
Annex 1: The IUCN Caracas Declaration - protected areas and the human future, 1992	41
Annex 2: IUCN Resolution 19.21 (1994) – Indigenous People and the Sustainable Use of Natural resources	43
Annex 3: IUCN World Conservation Congress, Resolution 1.53 (1996)	45
Annex 4: IUCN/WCPA/WWF, Principles and Guidelines on Protected Areas and Indigenous/Traditional Peoples (2000)	47



## Executive Summary

This paper addresses an issue largely neglected in the debates about the rights of indigenous peoples in conservation initiatives: indigenous peoples' right to restitution of lands, territories and resources incorporated into protected areas without their consent. In doing so, it briefly examines attempts to address indigenous peoples' rights in the policies of conservation organizations; provides an overview of indigenous peoples' rights to lands, territories and resources in international law; outlines the remedies that arise when indigenous peoples' rights have been violated, including the right to restitution as a remedy for takings of indigenous lands, territories and resources for conservation purposes; and, provides a few short examples of restitution in various countries. Finally, it offers some concluding remarks and a number of recommendations for future action.

International conservation organizations, such as IUCN – The World Conservation Union, its World Commission on Protected Areas and the World Wildlife Fund (WWF), have adopted a series of resolutions and policy statements in the past decade that aim to address the rights and concerns of indigenous peoples in connection with conservation initiatives, particularly the establishment and management of protected areas. WWF, for instance, has acknowledged that, “without recognition of the rights of indigenous peoples, no constructive agreements can be drawn up between conservation organizations and indigenous peoples groups”.<sup>1</sup>

However, while these resolutions and policy statements represent an important step forward in reconciling conservation and indigenous peoples' rights, they fall short of guaranteeing indigenous peoples' rights as defined by international law and, in particular, fail to adequately address indigenous peoples' rights in existing protected areas. This is particularly the case for the IUCN/WCPA/WWF *Indigenous and Traditional Peoples and Protected Areas: Principles and Guidelines* (2000), which appear to backtrack on previous commitments to recognize and respect indigenous peoples' rights in accordance with international human rights instruments.

Indigenous peoples' rights to lands, territories and resources derive from traditional occupation and use and indigenous peoples' laws and customs relating to land and resource ownership and use, not from grants by state authorities. As noted by Osvaldo Kreimer of the Inter-American Commission on Human Rights: “Indigenous peoples, because of their pre-existence to contemporary States, and because of their cultural and historical continuity, have a special situation, an inherent condition that is juridically a source of rights”.<sup>2</sup> In some cases, treaties between indigenous peoples and states further define the nature and extent of these rights. These rights have been recognized repeatedly by intergovernmental human rights bodies under general human rights instruments and in treaties and draft declarations focused exclusively on indigenous peoples' rights.

<sup>1</sup> WWF *Statement of principles: indigenous peoples and conservation*. Gland, WorldWide Fund for Nature International, 1996.

<sup>2</sup> O. Kreimer, *The Future Inter-American Declaration on the Rights of Indigenous Peoples: A Challenge for the Americas*. In: C. Price Cohen (ed.), *Human Rights of Indigenous Peoples*, Transnational Publishers: Ardeley, New York, 1998, 69-70.

The vast majority of states in the world are party to at least one of these instruments and, therefore, have obligations to legally recognize and respect indigenous peoples' land and resource rights. Moreover, according to the Inter-American Commission on Human Rights, widespread acceptance of indigenous peoples' rights to lands, territories and resources based on traditional occupation and use has crystallized rules of customary international law binding on all states irrespective of ratification of the relevant instruments.

Violations of human rights trigger remedies designed to provide redress for the victims. In international human rights law, access to effective remedies is itself a right. As a general proposition, violation of indigenous peoples' land and resource rights gives rise to both a general remedy and a specific remedy expressed as a stand alone right. The former requires legal recognition, demarcation and titling of indigenous lands and territories, as defined by indigenous law and customs, and/or compensatory measures if damages have been sustained. In the absence of a mutually acceptable agreement to the contrary, the latter involves the right to restitution of lands, territories and resources taken or used without indigenous peoples' free and informed consent and compensation for any damages sustained as a consequence of the deprivation.

Until recently, the resolutions and policies of IUCN, WWF and others implicitly accepted the right to restitution and other applicable remedies by endorsing the principles and rights set forth in the UN draft Declaration on the Rights of Indigenous Peoples and other international instruments. Nonetheless, the WCPA, IUCN, WWF 2000 *Principles and Guidelines* fail to address this issue and, moreover, recognize an inferior measure of indigenous rights in established protected areas compared to those recognized in connection with future protected areas. Not only is this inconsistent with past resolutions and policy, as well as international law, it also denies justice to indigenous peoples by perpetuating past (and ongoing) violations. From this perspective, failure to address past wrongs constitutes an ongoing violation of indigenous peoples' rights that can only detract from and hinder constructive dialogue and trust between indigenous peoples and conservationists.

Despite international guarantees, there are few examples of restitution of lands within protected areas in domestic practice. Most of the extant examples are connected to recognition of aboriginal title or treaty rights in domestic law. Australia, Aotearoa-New Zealand, the United States and South Africa all provide examples of this. In Latin America, restitution has occurred in connection with recognition of indigenous rights to own traditional lands and resources under International Labour Organization Convention No. 169 and accompanying domestic legal reforms. Although some progress has been made, restitution is often subject to numerous conditions, such as lease-back arrangements, negotiated in circumstances in which indigenous peoples have little bargaining power and choice. This mirrors the failings of the 2000 *Principles and Guidelines* insofar as it undermines constructive dialogue and partnership between indigenous peoples and conservation bodies.

In order to ensure that indigenous peoples' rights are respected and that a firm foundation is laid for cooperation and constructive dialogue

between indigenous peoples and conservation bodies, the paper recommends that the 2000 *Principles and Guidelines* be amended, with meaningful participation by indigenous peoples, to account for and be consistent with the full range of indigenous peoples' rights in international law. Among these are recognition of indigenous peoples' ownership rights to lands, territories and resources traditionally owned or otherwise occupied and used within existing protected areas and the right to restitution of lands, territories and resources taken without indigenous peoples' free and informed consent and presently included within protected areas.

Mechanisms for improving dialogue among and cooperation between indigenous peoples, states and conservation bodies are also proposed. These include measures to ensure that negotiated agreements take place in a climate of mutual trust and respect in which each party is accorded equal status and where preconditions are not imposed and; to ensure indigenous peoples' participation in the formulation, adoption and implementation of national and international conservation policies, programmes and laws. Respect for the principle that indigenous peoples' right to consent to activities that affect them, including respect for their rights and duties held of and owed to past and future generations, is also highlighted.

Finally, it is recommended that IUCN clarify that all six of its current protected area categories can be applied to lands and territories owned and managed by indigenous peoples, subject to their free, prior and informed consent, and that it calls on governments to revise their national laws to give effect to these possibilities and principles; and that the V<sup>th</sup> World Congress on Protected Areas, to be held in 2003, explicitly endorse the full range of indigenous peoples' rights and establish participatory mechanisms to give effect to those rights within its policy and operational spheres. Similar steps are recommended to ensure that states party to the Convention on Biological Diversity and the Global Environment Facility revise their policies and practices in conformity with these principles.

12 October 2002



# I Introduction

How to deal with indigenous peoples' rights and concerns in connection with conservation initiatives, particularly protected areas, has been debated extensively in the recent past. Conservation bodies such as the World Congress on Protected Areas, IUCN and WWF have taken important steps to elaborate policy statements that aim to provide minimum standards on indigenous peoples in conservation (see, Annexes).<sup>3</sup> Some of these policies make reference to international human rights standards such as the UN draft Declaration on the Rights of Indigenous Peoples and International Labour Organization Convention No. 169 (ILO 169). It should also be noted here that a number of large and influential conservation organizations have not subscribed to these principles and presently have no policy on indigenous peoples.

The most recent elaboration of standards, the IUCN/WCPA/WWF *Indigenous and Traditional Peoples and Protected Areas: Principles and Guidelines*, however, appears to apply different standards concerning indigenous peoples' rights in existing and future protected areas and, in doing so, backtracks on previous commitments to uphold these rights as defined by international law.<sup>4</sup> These *Principles and Guidelines* state that in existing protected areas, traditional use, but not ownership, rights should be guaranteed, whereas in future protected areas, legal recognition of collective rights to lands, territories and resources traditionally owned or otherwise occupied and used should be addressed, with interim protective measures in place until such recognition has occurred. The *Principles and Guidelines* therefore:

- generally, do not comply with the full extent of indigenous peoples' land and resource rights in international law; and,
- do not adequately and effectively address the consequences of protected areas previously established on indigenous peoples' territories.

Indigenous peoples' rights have been recognized under human rights instruments of general application in addition to those exclusively dealing with indigenous peoples such as ILO 169. These rights have been interpreted expansively by intergovernmental bodies and have strengthened considerably in recent years. Today there is a discrete body of law that, while still evolving in certain respects, can be classified as indigenous peoples' rights in international law. The norms contained in this body of law are a source of obligation for states and, by implication, non-state actors alike.<sup>a</sup> Furthermore, no less than

<sup>3</sup> *Guidelines for Protected Area Management Categories*. Commission on National Parks and Protected Areas, IUCN, Gland, 1994; *WWF Statement of principles: indigenous peoples and conservation*. Gland, WorldWide Fund for Nature International, 1996; *World Conservation Congress: resolutions and recommendations*. IUCN, Gland, 1996; and, J. Beltrán, (Ed.). *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*. IUCN, Gland, Switzerland and Cambridge, UK and WWF International, Gland, Switzerland, 2000. [Pre-publication]

<sup>4</sup> J. Beltrán, *ibid.*, Principle 2 and Guidelines 2.1-2.5.

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<sup>a</sup> State responsibility for violation(s) of human rights arises from breaches of a human rights treaty or a human rights norm of customary international law. Human rights treaties impose a duty on states to legally guarantee, respect and ensure the exercise of rights recognized, which, among others, imposes a due diligence obligation to respond to violations committed by private persons as well as to abstain from state-authored violations.

the Inter-American Commission on Human Rights has classified a series of norms applying to indigenous peoples' land and resource rights as "general principles of international law" (customary international law) binding on all states irrespective of whether they have ratified the relevant international instruments (see below).

It is well understood that in many cases conservation activities have had a substantially negative impact on indigenous peoples in the past and, although the situation has improved, some continue to do so in the present (see Box, below). Among others, it is well documented that indigenous peoples' lands and resources have been expropriated, they have been denied access to and control over vital subsistence and cultural resources as well as their sacred and religious sites, they have been forcibly relocated, subjected to other human rights abuses and almost all protected areas have been established on indigenous peoples' territories without their consent. While acknowledging this, recent policy advances do not attempt to address past and ongoing wrongs in connection with existing protected areas in a manner that complies with international law.

### **Box**

#### **Present denials of indigenous rights in conservation activities**

In 2001-02, the UN Committee on the Elimination of Racial Discrimination highlighted two instances in which the rights of indigenous peoples were compromised by protected areas:

13. The Committee expresses concern at the ongoing dispossession of Basarwa/San people from their land, and about reports stating that their resettlement outside the Central Kalahari Game Reserve does not respect their political, economic, social and cultural rights. The Committee draws the attention of the State party to its General Recommendation XXIII on Indigenous Peoples, and recommends that no decisions directly relating to the rights and interests of members of indigenous peoples be taken without their informed consent. The Committee recommends that negotiations with the Basarwa/San and non-governmental organizations be resumed on this issue, and that a rights-based approach to development be adopted. (*Concluding observations of the Committee on the Elimination of Racial Discrimination : Botswana. 23/08/2002.*)

335. The situation of the country's indigenous people, the Veddas, and the creation of a national park on their ancestral forestland is of concern. In this context attention is drawn to the Committee's general recommendation XXIII calling upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources. (*Concluding observations of the Committee on the Elimination of Racial Discrimination : Sri Lanka. 14/09/2001.*)

This paper focuses on a right and remedial measure intended to address past (and ongoing) wrongs – the right of indigenous peoples to restitution of lands and resources taken without their informed consent for conservation purposes. This issue is directly related to both of the two points set out above. As discussion among conservation bodies moves beyond access arrangements to subjects such as recognizing indigenous peoples' rights to establish, own, manage and control their own protected areas and to other constructive arrangements for co-ownership and co-management of protected areas, the issue of restitution of indigenous lands previously incorporated into protected areas will increase in importance.

Indigenous peoples' relationship to traditional lands is inter-generational, involving rights and duties held from and owed to past and present generations. A past wrong can be indistinguishable from and as denigrating and painful as a present wrong. The same is also the case legally: a past violation may have ongoing and continuing effects that are presently justiciable. Therefore, policy and benchmark standards that are consistent with international human rights norms must be developed by international conservation agencies to provide the basis for coordinated attention to this issue.

In order to discuss the preceding, this paper will:

- briefly outline the nature of indigenous peoples' rights to lands, territories and resources as defined by intergovernmental human rights bodies;
- briefly discuss restitution in international law in general and specifically in relation to indigenous peoples' rights;
- provide a few short examples of restitution of indigenous lands in protected areas from prior and contemporary practice; and
- offer some concluding remarks and recommendations.

An understanding of the nature and extent of indigenous peoples' rights to lands and resources in international law is crucial to both an understanding of the larger issue of indigenous peoples' rights in connection with conservation and the nature of restitution in the same context; I will begin there.



## II Indigenous Peoples' Rights to Lands and Natural Resources

International law requires that indigenous peoples' ownership and other rights to their lands, territories and resources be legally recognized and respected, which includes titling, demarcation and measures to ensure their integrity. These rights are protected under international law in connection with a variety of other rights, including the general prohibition of racial discrimination, the right to property, the right to cultural integrity and as part and parcel of the right to self-determination.

### A Universal Human Rights Instruments

#### 1 International Covenant on Civil and Political Rights

Indigenous peoples' rights to lands, territories and resources have been addressed a number of times by intergovernmental bodies under human rights instruments of general application. Concerning the **territorial aspects of self-determination**, the UN Human Rights Committee (HRC), stated in relation to Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> that

the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). . . . The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.<sup>6</sup>

The HRC reached similar conclusions – that the State implement and respect the right of indigenous peoples to self-determination, particularly in connection with their traditional lands – in its Concluding Observations on the reports of Mexico and Norway issued in 1999 and Australia in 2000.<sup>7</sup> In its complaints-based jurisprudence,<sup>b</sup> the HRC has also related the right to self-determination to the right of indigenous peoples to enjoy their culture under Article 27 of the ICCPR.<sup>8</sup>

Article 27 of the ICCPR<sup>9</sup> protects linguistic, cultural and religious rights and, in the case of indigenous peoples, includes, among others,

<sup>5</sup> The ICCPR has been ratified by 145 States as of January 2001.

<sup>6</sup> *Concluding observations of the Human Rights Committee: Canada*. 07/04/99. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) 1999, at para 8.

<sup>7</sup> *Concluding observations of the Human Rights Committee: Mexico*. UN Doc. CCPR/C/79/Add.109 (1999), para. 19; *Concluding observations of the Human Rights Committee: Norway*. UN Doc. CCPR/C/79/Add.112 (1999), paras. 10 and 17; and *Concluding observations of the Human Rights Committee: Australia*. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments), para. 8.

<sup>8</sup> *Apirana Mahuika et al. vs. New Zealand* (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2.

<sup>9</sup> Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Almost identical language is found in Article 30 of the UN Convention on the Rights of the Child, therefore, the points made here are also relevant to the rights of indigenous children, and by implication the larger Indigenous community, under that instrument. The CRC has been ratified by 191 States as of January 2000.

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<sup>b</sup> Complaints-based jurisprudence refers to decisions issued in cases submitted to the HRC pursuant to Optional Protocol I of the ICCPR.

<sup>10</sup> Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990), 1. See also, Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; Lovelace vs. Canada (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40) 166, UN Doc. A/36/40 (1981). *I. Lansman et al. vs. Finland* (Communication No. 511/1992), UN Doc. CCPR/C/52/D/511/1992; and, *Jouni Lansman et al. vs. Finland* (Communication No. 671/1995), UN Doc. CCPR/C/58/D/671/1995. Although not decided under Article 27, see, also, *Hopu v. France*. Communication No. 549/1993; France. 29/12/97. UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997.

<sup>11</sup> *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant : 04/11/94*. Human Rights Committee, General Comment No. 24 (1994), para. 8. See, also, S.J. Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 *Ariz. J. Int'l & Comp. L.* 1, 15 (1991).

<sup>12</sup> *Supra* note 10, at 3.

<sup>13</sup> *Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments)*, at paras. 10 and 11.

<sup>14</sup> CERD has been ratified by 160 States as of January 2000.

<sup>15</sup> T. Meron, *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press 1989, 21.

<sup>16</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997*. UN Doc. CERD/C/51/Misc.13/Rev.4.

rights to land and resources, subsistence and participation.<sup>10</sup> Article 27 embodies one manifestation of the general norm of international law relating to the right to cultural integrity.<sup>11</sup> The HRC has interpreted Article 27 to include the “rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”. In reaching this conclusion, the HRC recognized that indigenous peoples’ subsistence and other traditional economic activities are an integral part of their culture, and interference with those activities can be detrimental to their cultural integrity and survival. By necessity, the land, resource base and the environment thereof also require protection if subsistence activities are to be safeguarded.

In 1994, the HRC further elaborated upon its interpretation of Article 27 by stating that

With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>12</sup>

In July 2000, it added that Article 27 requires that “necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands . . .” and; “securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities . . . must be protected under article 27 . . .”.<sup>13</sup>

## **2 Convention on the Elimination of All Forms of Racial Discrimination**

Under the Convention on the Elimination of All Forms of Racial Discrimination (CERD) states-parties are obligated to recognize, respect and guarantee the right “to own property alone as well as in association with others” without discrimination.<sup>14</sup> The principal provisions of CERD, including the right to property, are declaratory of customary international law.<sup>15</sup> In its 1997 General Recommendation, the UN Committee on the Elimination of Racial Discrimination elaborated on indigenous peoples’ rights under CERD. In particular, the Committee called upon states-parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories”.<sup>16</sup>

### **3 International Labour Organization Convention No. 169**

International Labour Organization Convention No. 169 contains a number of provisions on indigenous peoples' territorial rights.<sup>17</sup> These provisions are framed by Article 13(1) which requires that governments recognize and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories and especially "the collective aspects of this relationship". Article 14 requires that indigenous peoples' collective "rights of ownership and possession . . . over the lands which they traditionally occupy shall be recognized" and that states "shall take steps as necessary to identify" these lands and to "guarantee effective protection of [indigenous peoples'] rights of ownership and possession". Article 13(2) defines the term "lands" to include "the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use". Finally, Article 16(2) provides that indigenous peoples may only be relocated, as an exceptional measure, and only after their consent has been obtained. It also specifies the remedies that pertain if relocation does take place (see below).

ILO 169's predecessor, ILO Convention No. 107 (1957), also provides that "The right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized". The ILO Committee of Experts has held that the rights that attach under Article 11 also apply to lands presently occupied irrespective of immemorial possession or occupation. It stated that the fact that the people in question has some form of relationship with land presently occupied, even if only for a short time, was sufficient to form an interest and, therefore, rights to that land and the attendant resources.<sup>18</sup> ILO 107 has been ratified by 27 states, many of them in Asia and Africa.<sup>19</sup>

## **B Regional Instruments**

### **1 Inter-American Instruments**

It is well established in the Inter-American system that indigenous peoples have been historically discriminated against and therefore, that special measures and protections are required if they are to enjoy the full enjoyment of human rights. These special measures include protections for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, "ancestral and communal lands", and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.<sup>20</sup>

According to the Inter-American Commission and Court on Human Rights, indigenous peoples' property rights derive from their own laws and traditional occupation and use and exist even without formal recognition by the state.<sup>21</sup> It has related territorial rights on a number

<sup>17</sup> As of October 2002, the following 16 states have ratified ILO 169: Mexico, Norway, Costa Rica, Colombia, Denmark, Ecuador, Fiji, Guatemala, The Netherlands, Dominica, Peru, Bolivia, Honduras, Venezuela, Argentina and Paraguay. Austria and Brazil have ratified, but have yet to transmit their instruments of ratification to the ILO. The following states have submitted it to their national legislatures for ratification or are discussing ratification: Chile, The Philippines, Finland, El Salvador, Russian Federation, Panama, and Sri Lanka.

<sup>18</sup> *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A), at 287, International Labour Conference, 75th Session, Geneva (1988).

<sup>19</sup> A number of state-parties automatically denounced ILO 107 upon ratification of ILO 169.

<sup>20</sup> See, among others, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.26. (1984), at 76-78, 81; *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 103-4; *Case 7615 (Brazil)*, OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), at 24, 31; and, *Third Report on the Situation of Human Rights in The Republic of Guatemala* OEA/Ser.L/V/II. 67, doc. 9 (1986), at 114.

<sup>21</sup> Case 11.577 (Awaj Tingni Indigenous Community - Nicaragua), *Annual report of the IACHR*. OEA/Ser.L/V/II.102, Doc.6 rev., (Vol. II), April 16, 1999, 1067, para. 108 and, See, also, art. XVIII, *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the IACHR in 1997.

<sup>22</sup> *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 115.

<sup>23</sup> *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev., June 2, 2000, at Ch. X, para. 16. See, also, in accord, *Third Report on the Human Rights Situation of Human Rights in Paraguay*. OEA/Ser.L/V/II.110 Doc.52 9 March 2001, Ch. IX, para. 47.

<sup>24</sup> *Judgment of the Inter-American Court of Human Rights in the case of The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua Issued 31 August 2001*, Inter-American Court on Human Rights, Series C No. 79 (2001), at para. 149.

<sup>25</sup> *Id.*, at para. 151.

<sup>26</sup> *Id.*, at para. 164.

of occasions to cultural integrity, thereby recognizing the fundamental connection between indigenous land tenure and resource security and the right to practice, develop and transmit culture free from unwarranted interference. In 1997, for instance, the IACHR stated that “For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to ‘the geographical space necessary for the cultural and social reproduction of the group.’”<sup>22</sup> It reiterated this conclusion in 2000, stating that “The recovery, recognition, demarcation and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity”.<sup>23</sup>

In the case of *Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua*, the Inter-American Court on Human Rights confirmed that indigenous peoples’ territorial rights arise from traditional occupation and use and indigenous forms of tenure, not from grants by the state. In its judgment, issued in 2001, the Court observed that

Among indigenous communities, there is a communal tradition as demonstrated by their communal form of collective ownership of their lands, in the sense that ownership is not centered in the individual but rather in the group and in the community. By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.<sup>24</sup>

Finding that “As a product of [customary law], possession of land should suffice to entitle indigenous communities without title to their land to obtain official recognition and registration of their rights of ownership,”<sup>25</sup> the Court ordered, among others, that “the State must adopt measures of a legislative, administrative, and whatever other character necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities’ properties, in accordance with the customary law, values, usage, and customs of these communities”.<sup>26</sup>

Most recently, in the *Mary and Carrie Dann* case, citing extensive international jurisprudence, the IACHR stated that “general international legal principles applicable in the context of indigenous human rights” include:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and

- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
- This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>27</sup>

In this case, the IACHR interpreted the American Declaration on the Rights and Duties of Man (1948) to require “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources . . . ,”<sup>28</sup> and held that that, “Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole”.<sup>29</sup>

## **2 The African Charter on Human and Peoples’ Rights**

The African Charter on Human and Peoples’ Rights is also relevant here. Property rights are guaranteed under Article 14 and the right to equal protection of the law, both for individuals and peoples (Articles 3 and 19), and the prohibition of discrimination (Article 2) are also recognized. Articles 19-24 of the African Charter set out the rights of peoples, including the right to self-determination, the right to freely dispose of natural wealth and the right to a satisfactory environment. If UN and IACHR jurisprudence is relied upon, these provisions read together will amount to a recognition of indigenous peoples’ property rights based upon traditional occupation and use.<sup>30</sup>

## **3 CARICOM Charter of Civil Society**

Finally, in 1997, the Heads of State of the Caribbean Community adopted the CARICOM Charter of Civil Society, which provides in Article XI that “The States recognise the contribution of the indigenous peoples to the development process and undertake to continue to protect their historical rights and respect the culture and way of life of these peoples”. The term “historical rights” certainly includes, among others, ownership of lands, territories and resources traditionally owned or otherwise occupied and used.

<sup>27</sup> Inter-American Commission of Human Rights, *Report N° 113/01*, Case N° 11.140, Mary and Carrie Dann (United States), October 15, 2001, at para. 130 (footnotes omitted).

<sup>28</sup> *Id.*, at para. 131.

<sup>29</sup> *Id.*, at para. 140.

<sup>30</sup> The African Commission recently established a Working Group on Indigenous Peoples with a mandate to assess indigenous rights in relation to the right to self-determination and other rights which may provide further guidance on this issue. African Commission on Human and Peoples’ Rights, *Resolution on the Rights of Indigenous People/Communities in Africa*, Cotonou, Benin, 6 November 2000.

## **C Emerging Rights (instruments currently awaiting approval)**

Recent normative developments relating to indigenous lands, territories and resources are expansive, requiring legal recognition, restitution and compensation, protection of the total environment thereof, and various measures of participation in extra-territorial activities that may affect subsistence rights and environmental and cultural integrity. With regard to land rights, Article 26 of the UN Draft Declaration, for instance, provides that

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal sea, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation or encroachment upon these rights.

The proposed American Declaration also provides a substantial measure of protection (Article XVIII):

- 1 Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property.
- 2 Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.
- 3
  - i) Subject to 3 ii), where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.
  - ii) Such titles may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
  - iii) Nothing in 3 i) shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.
- 4 Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.

Although these instruments are placed here under the “emerging rights” section, it is important to note that the distinction between rights recognized under existing instruments and “emerging” indigenous rights is somewhat artificial as the majority of the so-called emerging standards either build upon existing human rights or are contextualized restatements or elaborations thereof. With regard to the proposed American Declaration on the Rights of Indigenous Peoples, for instance, the IACHR has stated that it “considers that the basic principles reflected in many of the provisions of the Declaration [on Indigenous Peoples] including aspects of Article XVIII [on land rights], reflect general international legal principles developing out of and applicable inside and outside of the inter-American system . . . .”<sup>31</sup>

<sup>31</sup> Inter-American Commission of Human Rights, *Report N° 113/01*, Case N° 11.140, Mary and Carrie Dann (United States), October 15, 2001, at para. 129.

As can be seen from the preceding, human rights standards, as set out in treaties, in jurisprudence interpreting those treaties and in emerging standards, all require that indigenous ownership rights, at a minimum over lands traditionally occupied, be recognized and respected. This must be borne in mind when discussing restitution of lands previously incorporated into protected areas; without negotiated agreement consented to by the indigenous people as a whole, the object of restitution is lands traditionally occupied and used.



### III Restitution in International Human Rights Law

#### A General Principle

Having established that indigenous peoples have collective rights to own, use, control and peacefully enjoy their traditional lands and resources, I will now address the applicable remedies for violations of those rights. In the case of indigenous peoples' land and resource rights, both general remedies and a specific remedy expressed as a right apply. The former applies generally where indigenous ownership rights have not been recognized (by omission) or have been actively violated (by commission or act); the latter, specifies that restitution is the primary remedy where indigenous peoples have been deprived of their lands, territories and resources traditionally or historically owned or otherwise occupied and used.

Under international law, violation of a human right gives rise to a right of reparation for the victim(s).<sup>32</sup> Reparation is intended to relieve the suffering of and afford justice to victims "by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations".<sup>33</sup> In human rights law, the availability of effective remedies is a right in and of itself that complements other recognized rights.<sup>34</sup> Remedies include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

With regard to restitution, Theo van Boven, UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, states in his landmark UN study on reparations that "Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, *inter alia*, restoration of liberty, citizenship or residence, employment or property".<sup>35</sup> The Inter-American Court on Human Rights has consistently held that "Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio integrum*), which includes the restoration of the prior situation . . ." and compensation or other forms of indemnification for material and immaterial damages.<sup>36</sup> The same principle has been applied by United Nations bodies responsible for oversight of state compliance with universal human rights and instruments, the International Court of Justice, and the European Court on Human Rights pursuant to Article 50 of the European Convention of Human Rights.

<sup>32</sup> Inter-American Court on Human Rights, *Velasquez Rodriguez Case. Compensatory Damages. Judgment of July 21, 1989 (Article 63(1) American Convention on Human Rights*. Series C No. 7, p. 49, para. 25, citing, Permanent Court of International Justice, *Factory at Chorzow Case, Merits*, Judgment No. 13, 1928, P.C.I.J., Series A, No 17, p. 29 and; International Court of Justice, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184. For a detailed treatment of remedies in human rights law, see, D. Shelton, *Remedies in International Human Rights Law*. Oxford: OUP 1999.

<sup>33</sup> *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/1993/8, at p. 56.

<sup>34</sup> See, among others, art. 8, Universal Declaration of Human Rights; art. 2(3) International Covenant on Civil and Political Rights; art. 6, Convention on the Elimination of All Forms of Racial Discrimination; art. 13, European Convention on Human Rights; arts. 1, 8 and 25 of the American Convention on Human Rights and; art. 7, African Charter on Human and Peoples' Rights.

<sup>35</sup> *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/1993/8, at p. 57.

<sup>36</sup> *Supra* note 32, p. 49, para. 26.

## **B Restitution of Indigenous Peoples' Lands and Resources**

<sup>37</sup> *Supra* note 35, at para. 14.

<sup>38</sup> *Ibid.*, at para. 17 (footnotes omitted).

The general principle of restitution in human rights law also applies to indigenous peoples. However, there is a difference in its application to indigenous peoples because both individual members and the indigenous people as a collectivity hold rights. As stated by van Boven, a “coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly”.<sup>37</sup> He adds that:

Vital to the life and well-being of indigenous peoples are land rights and rights relating to natural resources and the protection of the environment. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous peoples to compensation in the case of damages resulting from exploration and exploitation programmes pertaining to their lands, and in case of relocation of indigenous peoples. The draft declaration on the rights of indigenous peoples [art. 27] recognizes the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those territories which were lost.<sup>38</sup>

Article 27 of the UN draft Declaration on the Rights of Indigenous Peoples, referred to by van Boven above, states that:

Indigenous peoples have the right to the restitution of the lands and territories which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article XVIII(7) of the Proposed American Declaration on the Rights of Indigenous Peoples contains similar language and provides that:

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible the right to compensation in on a basis not less favorable than the standard of international law.

In 1997, the UN Committee on the Elimination of Racial Discrimination also addressed this issue in its General Recommendation

XXIII, which interprets and elaborates upon state obligations under the Convention of the same name. Echoing the two draft Declarations quoted above, the Committee called upon states:

to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, *where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.*<sup>39</sup> (emphasis added).

Finally, Article 14 of ILO 169 requires that indigenous peoples' collective "rights of ownership and possession . . . over the lands which they traditionally occupy shall be recognized". The term "traditionally occupy" does not require a continued and present occupation, but, rather, according to the ILO, "there should be some connection to the present".<sup>40</sup> Consequently, under ILO 169, and ILO 107, which uses the same language, indigenous peoples have the right to restitution and recognition of their rights to lands "traditionally occupied" that they have been expelled from or that they have lost title to or possession over in the recent past, including those incorporated into protected areas without their consent. The term recent past is undefined, but presumably refers to events taking place within the past one to two generations.

The preceding are all expressions of the specific right to restitution of lands, territories and resources of which indigenous peoples have been deprived without their consent. In the case of relocation, both consensual and non-consensual, ILO 169 Article 16(3-5), also contains specified remedies: a) the right to return to traditional lands once the reason for relocation no longer pertains; b) lands of equal quality and legal status, unless the people(s) concerned express a preference for compensation, and; c) full compensation for any loss or injury resulting from relocation.

I will now turn to the general remedy that applies to cases where indigenous peoples' territorial rights have been violated. The Inter-American Court on Human Rights has provided the most detailed analysis of the reparations due indigenous peoples for violations of land and resource rights. In the *Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua* Case, the Court explained that it "has reiterated in its constant jurisprudence that it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it".<sup>41</sup> The Court then elaborated and ruled that:

For the aforementioned reason, pursuant to article 2 of the American Convention on Human Rights, this Court considers that the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values,

<sup>39</sup> *Supra* note 16, at para. 5.

<sup>40</sup> *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual*. International Labour Office (Project to Promote ILO Policy on Indigenous and Tribal Peoples), Geneva, 2000, at 18.

<sup>41</sup> *Supra* note 24, at para. 163.

customs and mores. Furthermore, as a consequence of the aforementioned violations of rights protected by the Convention in the instant case, the Court rules that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores. Until the delimitation, demarcation, and titling of the lands of the members of the Community has been carried out, Nicaragua must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live and carry out their activities.

and;

[t]he Court considers that due to the situation in which the members of the Awas Tingni Community find themselves due to lack of delimitation, demarcation, and titling of their communal property, the immaterial damage caused must also be repaired, by way of substitution, through a monetary compensation. Under the circumstances of the case it is necessary to resort to this type of compensation, setting it in accordance with equity and based on a prudent estimate of the immaterial damage, which is not susceptible of precise valuation. Due to the above and taking into account the circumstances of the cases and what has been decided in similar cases, the Court considers that the State must invest, as reparation for the immaterial damages, in the course of 12 months, the total sum of US\$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Inter-American Commission.

In sum, the preceding confirms that indigenous peoples have a specific right to restitution of lands traditionally owned or otherwise occupied and used which have been taken without their free and informed consent, including lands presently within protected areas. In this case, restitution operates both as a stand alone right and as a remedial measure. The nature and extent of lands traditionally owned or otherwise occupied and used is determined by reference to both factual occupation and use, present and historical, and indigenous peoples' laws, traditions and customs. Compensation for all material and immaterial damages is also required. The general remedy for violation, both by act and omission, of indigenous peoples' land and resource rights is legal recognition, including delimitation, demarcation and titling, of collective property in accordance with indigenous peoples' customary law, values, customs and mores. In the case of both consensual and non-consensual relocation, specific remedies have been identified, including restitution, lands of equal quality and legal status and compensation.

The preceding may not be the only result however; indigenous peoples may freely consent to alternative arrangements short of full restitution including: joint ownership and management of protected areas;

redrawing boundaries; continued incorporation in a protected area subject to conditions; co-management and benefit sharing agreements; site specific or general access agreements; or a range of other options. To be consistent with international law, these arrangements must be consented to by the affected indigenous people(s) as a whole after consideration of all relevant information and without coercion (free, prior and informed consent).



## **IV Protected Areas and Restitution: Examples**

There are few examples of the restitution of indigenous lands and resources previously incorporated into protected areas in contemporary practice. There are even fewer that can be considered to comply with international human rights law. This section of the paper will highlight some of these examples, briefly explain the situation and note a few observations.

### **A †Khomani San (South Africa)**

In March 1999, the South African government concluded an out-of-court settlement with the †Khomani San people providing for recognition of their land rights over an area of 65,000 hectares in addition to land use rights in the Kalahari Gemsbok National Park (KGNP: renamed the Kgalagadi Transfrontier Park). The †Khomani San had been evicted from the Kalahari Gemsbok National Park soon after its formation in 1931 and were dispersed over a wide area today comprising South Africa, Botswana and Namibia.

The settlement was based on legal proceedings filed under post-apartheid legislation known as the *Restitution of Land Rights Act 1994*. In their pleadings filed before South Africa's Land Claims Court, the †Khomani San had claimed traditional rights in and to a vast area of about 4,000 km<sup>2</sup> based on the anthropologically proven hunting and gathering territories of the San, comprising, among others, approximately one half of the KGNP. They quantified their claim as being for 500,000 hectares of land over which they lost traditional "use" (hunting and gathering) rights, transferred or reduced to a claim amounting to 125,000 hectares of "ownership" rights.

While a final settlement with regard to the areas within the National Park has yet to be concluded, it is expected that this will include:

1. Ownership of 25,000 hectares on the Park's southern boundary, within which they will be relatively free – within the limits of a "contract park agreement" – to carry out cultural practices, hunt, collect bush foods, and conduct ecotourism ventures. These will include walking and overnight trails, and 4x4 vehicle routes. The San accept the provision that no permanent residence will be allowed inside the Park itself.
2. Priority commercial use of the area between the owned area and the Auob river. In this zone, the †Khomani will be entitled, in addition to all cultural practices, to formulate and conduct ecotourism projects, with the SA National Parks Board (SANP) or other partners.

<sup>42</sup> R. Chennells, 'The ǀKhomani San Land Claim', 26(1) *Cultural Survival Quarterly* 2002.

<sup>43</sup> *Mier and ǀKhomani San. Findings by Monitoring and Evaluation Directorate, April 2002*. Dept. of Land Affairs, Republic of South Africa, 2002. Accessed on 2 Oct. 2002 at: <http://www.me-dla.org.za/systems/mierkhomani.pdf>.

<sup>44</sup> Pers. com. Dr. Hanna Jaireth, 26 December 2002.

3. Symbolic and cultural use of an area comprising about one-half of the South African section of the Park – about 4,000 square kilometers in the southern section. This right means, in effect, that the San are able to use the entire region of their traditional and ancestral use for any other than commercial reasons. Groups of elders and youth, for example, may travel deep into the Park and experience the Kalahari as it was, living off the land as they once did. One or more central sites will be developed where the elders can gather regularly to travel into the vast red-duned interior of the Kalahari.

4. Commercial opportunities. The SANP has recognized that the San heritage is – and should be – inextricably linked with the identity of this section of the Kalahari, and it intends to find ways to give that notion substance. A jointly owned (San and SANP) commercial lodge at the confluence of the Auob and Nossob rivers has been agreed to in principle. The San will be employed there, not only as trackers but also in other capacities. Further commercial opportunities, where guests will be able to explore the Kalahari through the eyes and experience of the ǀKhomani San, are now being discussed.

5. A community nature park, shared between the San and their rural neighbors. The community of Mier has been agreed to in principle, covering the area between the small town of Welkom, 10 kilometres from the Park gate, and the Park itself. This nature park will provide opportunities for the sale of crafts and artwork to tourists who do not wish to engage in more arduous journeys into the Kalahari.<sup>42</sup>

ǀKhomani San areas of the national park are to be subject to a co-management arrangement modelled on Australian and other Commonwealth experiences.<sup>43</sup> During the World Summit on Sustainable Development, held in South Africa in August 2002, the South African government flew World Summit delegates to a ceremony where officials formally handed over title to 25,000 hectares of the Kgalagadi Park.

## **B Australia (Various)**

Both the Australian Commonwealth (Federal) and State/Territorial governments have enacted legislation that recognizes aboriginal peoples as owners of national parks or effects transfers of existing protected areas lands to aboriginal peoples. The best known aboriginal-owned parks are Uluru-Kata Tjuta National Park and Kakadu, Nitmiluk (Katherine Gorge) and Gurig National Parks in the Northern Territory. The *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) provides for joint management arrangements for three Aboriginal owned and jointly managed national parks (Uluru, Kakadu and Booderee) and has various other provisions that recognise the rights and interests of aboriginal peoples.<sup>44</sup>

This Act repealed the *National Parks and Wildlife Conservation Act 1975* (Cwlth) which provided that where a national park is on aboriginal land, the federal minister responsible and the relevant Aboriginal Land Council must convene a board of management, the majority of which shall be aboriginal and nominated by the traditional owners. Most of the abovementioned parks are governed by this provision as well as by “lease-back” provisions requiring that the aboriginal-owned lands be leased back to federal, territorial or state conservation authorities. Leases are generally valid for 99 years and the policy framework provides that management plans are negotiated at five-yearly intervals.<sup>c</sup>

Where such legislation has been enacted by Australian states, the same lease-back requirement is also generally included. The New South Wales *National Parks and Wildlife (Aboriginal Ownership) Amendment Act 1996* (NSW), for instance, identified seven national parks to be returned to their traditional owners, subject to 30-year long lease-backs and joint management with the NSW National Park Service.<sup>45</sup> In Tasmania, pursuant to the *Aboriginal Lands Act 1995* (Tas), 12 parcels of land were returned, in fee simple, to the Aboriginal community. This included several islands and a number of mainland sites.<sup>46</sup>

While the preceding model has garnered much international interest and technically does constitute restitution, it should be clearly understood that the vast majority of aboriginal-owned protected areas have been established or continued as a pre-condition to the recognition and granting of aboriginal ownership. While the aboriginal owners, in most cases, do have a substantial say in management decisions, they had no say in the original decision about protected area status. Moreover, the lease-back requirement was legislatively imposed and a condition of transfer of ownership. The question must be asked: was this coercive approach the most constructive way forward to ensure good long-term relations between conservation authorities and indigenous peoples? International law requires free, prior and informed consent.

Finally, the concept of Indigenous Protected Areas (IPAs), introduced in 1996, deserves a mention. IPAs were developed in part to encourage or facilitate aboriginal peoples to manage their own lands for biodiversity conservation.<sup>47</sup> Beginning in 1996, 12 pilot IPAs were tested on aboriginal lands, public lands and in marine environments. The first IPA, Nantawarrina, a former pastoral lease comprising 580km<sup>2</sup>, was proclaimed in 1998. A plan of management was prepared by the South Australia Aboriginal Lands Trust in consultation with the traditional owners. The Nantawarrina IPA has been endorsed by the relevant state government and the property has been listed on the register of Australia’s protected areas as an IUCN Category II area.

<sup>45</sup> These parks are listed on Schedule 14 of the Act as: Mutawintji (Mootwingee) National Park and Historic Site (also including Cotaurandee Nature Reserve), Mungo National Park, Mount Grenfell Historic Site, Mount Yarrowck Nature Reserve, the NSW Jervis Bay National Park and Mutawintji National Park, the latter added in 1998. See, also, the *Aboriginal Land Act 1991* (Qld), the *Torres Strait Islander Land Act 1991* (Qld), which make limited categories of land in national parks available for claim by Aboriginal and Torres Strait Islander peoples, subject to a lease-back to the government. The *Nature Conservation Act 1992* (Qld) allows for the joint management of national parks on Aboriginal land where parks have been gazetted as claimable. The boards of management of such parks will have a majority representation of Aboriginal people.

<sup>46</sup> The sites were: two islands in the Furneaux group, two of which had previously been Nature Reserves (Mount Chappell Island and Badger Island); on the mainland: Oyster Cove, Mount Cameron West, Kutikina Cave, Ballawinne Cave, Wargata Mina Cave and Risdon Cove, three of which are part of the Tasmanian Wilderness World Heritage Area.

<sup>47</sup> See, generally, *Records of the 2nd meeting of the working group on indigenous protected areas*. Biodiversity Group, Environment Australia, Canberra (1996).

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<sup>c</sup> Gurig National Park, however, is leased in perpetuity to Conservation Commission of the Northern Territory which manages the park on a day to day basis and only four of the 12 member Board of Management are aboriginal. See, *Cobourg Peninsula Aboriginal Land and Sanctuary and Marine Park Act 1981* (NT) and; *Cobourg Peninsula Aboriginal Land and Sanctuary Amendment Act 1996*.

The *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) also includes provisions that are used for creating or recognising IPAs. It permits the Commonwealth Environment Minister to enter into conservation agreements for the protection of biodiversity on lands over which aboriginal peoples have usage rights. These agreements are required to take account of key provisions of the Convention on Biological Diversity related to indigenous intellectual property rights in biological resources and other matters.<sup>48</sup>

### **C Mt. Aoraki/Cook National Park (Aotearoa-New Zealand)**

In 1998, the New Zealand Parliament enacted the *Ngāi Tahu Claims Settlement Act* to give effect to a negotiated agreement between Ngāi Tahu, the largest Māori tribe on *Te Waipounamu* (New Zealand's South Island), and the New Zealand government. The Act had its origins in a claim submitted by Ngāi Tahu to the Waitangi Tribunal, a body established to investigate and make recommendations on violations of the 1840 Treaty of Waitangi concluded between the British Crown and some 500 Māori *Rangatira* (Chiefs). The underlying grievances took 147 years, or five generations of Ngāi Tahu, to resolve. The Ngāi Tahu claim is the largest reviewed by the Waitangi Tribunal to date and covers around 65 per cent of the lands administered by the New Zealand Department of Conservation including national parks, nature reserves and other protected areas.

In addition to a formal apology from the Crown for its “grave wrongdoings”, the Act also provided for a redress package of cash, land, a right of first refusal over disposal of Crown assets within Ngāi Tahu territory and new legal provisions and guarantees. Around 90 place names were also changed to joint Māori/English names to reflect Ngāi Tahu traditional ownership. The most relevant of the new legal provisions is recognition of the concept of *tōpuni*.

*Tōpuni* derives from the traditional Ngāi Tahu custom of *Rangatira* (chiefs) extending their *mana* (power and authority) over areas or people by placing their cloaks over them. As set forth in legislation, *tōpuni* comprises three elements: a statement of Ngāi Tahu values; a set of principles to avoid diminishing those values; and, agreed actions to give effect to the principles. As stated in the agreement, *tōpuni* provides a public symbol of Ngāi Tahu *manawhenua* (authority/power over land) and *rangatiratanga* (chiefly or governance authority) over public conservation areas, is a symbol of the tribe's commitment to conserving areas of high natural and historic value and ensures an active role for Ngāi Tahu in the management of the area.

Lands administered by the Department of Conservation were also returned to Ngāi Tahu. These included full title to Mt. Aoraki/Cook, the tribe's most sacred mountain and a living incarnation of their founding ancestors. Under the agreement, Ngāi Tahu agreed to gift the mountain back to the people of New Zealand for its continued

inclusion within Aoraki/Mount Cook National Park. Freehold title was also transferred to three conservation stations around Lake Wakatipu. It was agreed that Ngāi Tahu would gift the mountain tops to the Crown and lease areas of high conservation value amounting to 35,000 hectares to the Crown in perpetuity for a symbolic rental. The Crown Titī Islands were also transferred to Ngāi Tahu to be administered as a nature reserve and the Codfish Island Nature Reserve, now called Whenua Hou Nature Reserve, is jointly managed by Ngāi Tahu and the Department of Conservation. Several areas of the South Westland World Heritage Area were returned to Ngāi Tahu; areas of high conservation value are governed by covenants negotiated between Ngāi Tahu and the Minister of Conservation, while areas of low conservation value were returned without covenants.

The Ngāi Tahu settlement was not ideal from either the perspective of Ngāi Tahu, the New Zealand State or some of the New Zealand public. Nonetheless, it represents an agreed settlement of outstanding grievances over land and resource ownership, including those in areas declared as protected areas. As a freely consented to settlement, on its face, it is consistent with indigenous peoples' rights in international law. Settlements with other Māori tribes, either concluded or presently under discussion, also affect lands administered by the Department of Conservation and have included return of and other constructive arrangements concerning existing protected areas.<sup>49</sup>

I say "on its face", as ownership of conservation areas was one of the most contentious issues raised in the settlement and it was only addressed at the determined insistence of Ngāi Tahu. This is also the case generally; access to and ownership of much of the conservation estate throughout Aotearoa-New Zealand has been the source of great discontent among Māori tribes, many of whom maintain that it has been created at their expense. This was not helped by government's attempt to exclude conservation lands from Treaty of Waitangi settlements. Despite the requirement in the *Conservation Act* that the Department of Conservation "give effect to the principles of the Treaty of Waitangi," it has nevertheless been severely criticized for inadequate consultation with Māori, for taking an extreme preservationist stance to customary use of native flora and fauna, and for a lack of understanding about its obligations to give effect to the Treaty's principles.<sup>50</sup> This position led both the Tainui and Whakatohea tribes to either avoid or to negotiate options short of return, including creation of *tōpuni* reserves. This remains a sore point to this day.

## **D Timbisha Shoshone – Death Valley National Park (United States)**

The traditional lands of the Timbisha Shoshone people once encompassed some 11 million acres, mostly within the Mohave Desert. They were initially forced off much of their land in the mid-19<sup>th</sup> century when miners and homesteaders entered the area. This increased in the 1920-30s and they were forced to move four different times. Since

<sup>49</sup> See, among others, *Ngaati Ruanui Settlement, Ngati Mutunga Settlement, Ngati Tama Deed of Settlement, Ngati Turangitukua Settlement, Pouakani Claim Deed of Settlement, Rangitaane o Manawatu Settlement, Te Atiawa Settlement Heads of Agreement, Te Uri o Hau Settlement Heads of Agreement, Nga Rauru Kūtahi Settlement Agreement in Principle*.

<sup>50</sup> See, among others, M. Mutu, *Report to the Minister of Māori Affairs on the New Zealand Conservation Authority*. Auckland: Department of Māori Studies, Univ. Auckland, 1995.

1936 they have resided on approximately 40 acres of land near Furnace Creek inside Death Valley National Park.

The park was established as a National Monument in 1933, commencing a 67-year acrimonious fight between the Timbisha Shoshone and US government over ownership of the land. Despite recognition as an Indian tribe by the US Federal government in 1983, a permanent land base was not simultaneously recognized. It was not until 1994, with the passage of the *California Desert Protection Act*, that provision was made to commence a study on land suitable for a reservation for the Timbisha. Six years later, on 1 November 2000, the *Timbisha Shoshone Homeland Act* was enacted creating a reservation of approximately 7,600 acres, 314 of which were inside the national park itself. The purposes of the Act were set out as:

- (1) to provide in trust to the Tribe land on which the Tribe can live permanently and govern the Tribe's affairs in a modern community within the ancestral homeland of the Tribe outside and within the Park;
- (2) to formally recognize the contributions by the Tribe to the history, culture, and ecology of the Park and surrounding area;
- (3) to ensure that the resources within the Park are protected and enhanced by –
  - (A) cooperative activities within the Tribe's ancestral homeland; and
  - (B) partnerships between the Tribe and the National Park Service and partnerships involving the Bureau of Land Management;
- (4) to ensure that such activities are not in derogation of the purposes and values for which the Park was established;
- (5) to provide opportunities for a richer visitor experience at the Park through direct interactions between visitors and the Tribe including guided tours, interpretation, and the establishment of a tribal museum and cultural center;
- (6) to provide appropriate opportunities for economically viable and ecologically sustainable visitor-related development, by the Tribe within the Park, that is not in derogation of the purposes and values for which the Park was established; and
- (7) to provide trust lands for the Tribe in 4 separate parcels of land that is now managed by the Bureau of Land Management and authorize the purchase of 2 parcels now held in private ownership to be taken into trust for the Tribe.

In addition to title to 314 acres inside the national park, the Act also made provision for a number of special use areas, described as “nonexclusive special use areas for the Tribe . . .”. These include: a mesquite processing area, a buffer zone of 1,500 acres to protect the privacy of the tribe, and the Timbisha Shoshone Natural and Cultural Preservation Area. Within the latter,

- the tribe may establish and maintain a tribal resource management office near or in an existing ranger station;
- may use traditional camps at two locations in accordance with a jointly established management plan;
- the National Park Service and the Bureau of Land Management shall accommodate access and use by the tribe of:

- o the area for traditional cultural and religious activities, in a manner consistent with the purposes and intent of the American Indian Religious Freedom Act; and
- o areas designated as wilderness in a manner consistent with the purpose and intent of the Wilderness Act; and
- at the request of the tribe, the National Park Service and the Bureau of Land Management shall temporarily close to the general public certain areas in order to protect the privacy of tribal members engaging in traditional cultural and religious activities in those portions provided that any such closure shall affect the smallest practicable area for the minimum period necessary.

<sup>51</sup> 'Tribe Receives Trust Lands in Death Valley: Legislation grants land to tribe with historic ties to Death Valley', *National Parks Conservation Association Magazine*, Jan-Feb 2001.

<sup>52</sup> R. Keller & M. Turek, *American Indians and National Parks*. Tuscon: Univ. Arizona Press, 1998, at 171.

Members of the Tribe are authorized to use these special use areas “for low impact, ecologically sustainable, traditional practices pursuant to a jointly established management plan mutually agreed upon by the Tribe, and by the National Park Service or the Bureau of Land Management”. These “traditional practices”, however, “shall not include the taking of wildlife and shall not be in derogation of purposes and values for which the Park was established”. The prohibition of hunting was an amendment to the final draft instigated by environmental organizations.<sup>51</sup> Finally, to give effect to the Act, provision was made for “government-to-government consultations” and the development of protocols to review planned development in the Park.

## **E Havasupai/Grand Canyon National Park (United States)**

The Havasupai people (in present day Arizona) traditionally owned around 2.3 million acres including some of what is today known as Grand Canyon National Park. Pressure from miners and settlers led to their confinement in a 38,400 acre reservation in 1880. In 1882, the same year that the bill establishing the Grand Canyon National Park was laid before Congress, the reservation was reduced to 518.6 acres. From then until 1975, the Havasupai were engaged in a protracted and often bitter battle with the US National Park Service and environmental organizations as they sought to regain their lands in and around the National Park.

In 1975, President Ford signed the *Grand Canyon Enlargement Act*, which transferred 185,000 acres of US Park and Forest Service lands to the Havasupai Indian Reservation and created an additional 95,000 acre traditional use area within Grand Canyon National Park. However, a compromise with environmentalists and park officials was inserted in the Act, leading one observer to state that “the Havasupai had land but no sovereignty”.<sup>52</sup> Put another way, the Havasupai regained some of their former land base, but their use of the land, especially the 95,000 acre traditional use area within the national park, was severely restricted. Additionally, the Act extinguished all Havasupai claims and rights to any land outside of the newly enlarged reservation. As noted above, unilateral extinguishment of aboriginal rights violates the right of indigenous peoples to self-determination

<sup>53</sup> *Supra* note 3. See, also, Committee on the Elimination of Racial Discrimination, *Decision (2) 54 on Australia*, 18 March 1999. UN Doc. A/54/18, para. 21.

<sup>54</sup> See, Zuelma Suhn, 'The Isiboro-Sécure National Park'. In, *From Principles to Practice: Indigenous Peoples and Biodiversity Conservation in Latin America*. IWGIA Doc. No. 87, Copenhagen: Forest Peoples Programme and International Work Group for Indigenous Affairs, 1998, pp. 81-108.

<sup>55</sup> E. Arambize S., 'The Kaa-iyá Protected Area of the Gran Chaco: A case of collaboration between indigenous peoples and conservationists'. In, *ibid.*, pp. 192-98. See, also, Javier Beltrán (ed.) *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*. WCPA and IUCN, Gland, 2000, pp. 31-9.

and is also discriminatory in violation of international human rights guarantees.<sup>53</sup>

## **F Isiboro-Sécure Indigenous Territory and National Park (Bolivia)**

Isiboro-Sécure National Park was created in 1965 without any recognition of the presence or rights of indigenous peoples, the Mojeño, Yuracaré and Chimán peoples. It covers an area in excess of 1.1 million hectares. Due to increased pressures from migrants, coca producers, cattle ranchers, and oil and timber companies, indigenous peoples in the region organized in 1988 and demanded that the whole of the national park be recognized as their territory as well as a national park. In 1990, they marched to La Paz together with other indigenous communities demanding recognition of territorial rights. Shortly thereafter, the state recognized the area as a joint indigenous territory and national park.<sup>54</sup>

The recognition of the joint status of the area was supported by *Supreme Resolution No. 205862* of 1989, which provided for "the recognition, designation and ownership of territorial areas by the 'forest groups' and original indigenous communities from the east and Bolivian Amazon". It was further supported by Bolivia's ratification of ILO 169 in 1991 and the resulting 1994 reforms to the Bolivian Constitution. Finally, the 1993 *National Service Act for Agrarian Reform* required titling of indigenous peoples' lands and rights to natural resources. It also stated that recognition of indigenous lands was compatible with continued protected area status and explicitly instructed that the Isiboro-Sécure Indigenous Territory and National Park be immediately titled in favour of the indigenous peoples residing therein.

A similar arrangement has been made in the case of the Kaa-iyá Protected Area of the Gran Chaco in Bolivia.<sup>55</sup> The primary difference between this area and Isiboro-Sécure was that indigenous ownership and management issues were addressed almost simultaneously with creation of Kaa-iyá. However, to date there are many outstanding land titling problems in connection with Kaa-iyá.

## V Conclusions and Recommendations

In the past 200 years, almost 10 per cent of the world's surface has been set aside through the establishment of some 20,000 protected areas. By some estimates, around 50 per cent of these protected areas are on lands traditionally occupied and used by indigenous peoples.<sup>56</sup> In the Americas, this number rises to over 80 per cent. Many of these areas are presently subject to land claims filed by indigenous peoples. The *National Parks Framework Agreement* between the state government and the New South Wales Aboriginal Land Council, for instance, recognises that aboriginal rights may exist in 151 national parks; in Queensland, 15 protected areas have been gazetted as under claim; and in Western Australia<sup>d</sup> at least four national parks are subject to pending native title claims.<sup>57</sup> In Canada, First Nations have directed specific land claims at Parks Canada concerning: Banff (Alberta), Riding Mountain (Manitoba), Pukaskawa (Ontario), Bruce Peninsula (Ontario), and Point Pelee (Ontario). In addition to these federal parks, a number of provincial parks are also subject to aboriginal land claims.<sup>58</sup> The list could go on and include many other countries.

Additional protected areas are also planned all over the world, many of them affecting indigenous peoples' territories. In Guyana alone, a small country on the north-east coast of South America, 10 new protected areas are planned, eight of which affect indigenous territories presently and traditionally occupied and used. At least three of these areas are subject to existing aboriginal title claims and two others may soon follow the same path. None of these proposed areas account for the ownership rights of indigenous peoples, nor is their consent required in the process leading to establishment.

In developing countries many of these protected areas have been, and are being, implanted with the support of international "aid", including funds furnished by multilateral and bilateral development agencies. Notable among these is the Global Environment Facility (GEF), jointly administered by the World Bank, UNDP and UNEP, which acts as the vehicle for international funding to help implement the Convention on Biological Diversity. A number of GEF-funded protected area projects fail to comply with these international human rights standards, were established on indigenous peoples' land without their consent, sometimes obliging their relocation, and are implemented with reference to operational policies that do not conform to the rights of indigenous peoples in international law.<sup>59</sup> Given the

<sup>56</sup> S. Amend & T. Amend (eds.), *Espacios sin habitantes? Parques nacionales de America del Sur*, IUCN, Gland, 1992.

<sup>57</sup> See, generally, T. Corbett, M. Lane & C. Clifford, *Achieving indigenous involvement in management of protected areas: lessons from recent Australian experience*. Aboriginal Politics and Public Sector Management. Research Paper No. 5, Centre for Australian Public Sector Management, Griffith University, 1998 and; J. Collins, N. Klomp & J. Birckhead, *The recognition of Aboriginal and Torres Strait Islander hunting, fishing and gathering rights in Australia: a review of legislation, policy, international and common law*. Johnstone Centre, Charles Stuart University, Albury, 1997.

<sup>58</sup> *Putting Nature First: Conservation Principles to Guide the Settlement of Aboriginal Land Claims*. Federation Of Ontario Naturalists 1993 and; J. Morrison, *Protected Areas and Aboriginal Interests in Canada*. World Wildlife Fund Canada, 1993.

<sup>59</sup> Tom Griffiths and Marcus Colchester, 2000, *Indigenous Peoples, Forests and the World Bank: Policies and Practice*. Forest Peoples Programme, Moreton-in-Marsh. See, also, F. MacKay, *Universal Rights or a Universe unto Itself: Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 *American University International Law Review* 528 2002.

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<sup>d</sup> In August 2002, the High Court of Australia held in the case of *Western Australia v. Ward on behalf of the Miriuwung Gajerrong* (HCA 28 (8 August 2002)), that lands vested under the Western Australian Land Act for national park purposes extinguished native title, as did a special purpose lease in the Northern Territory creating the Keep River National Park.

conflicts that these impositions are generating, it is doubtful if these projects are sustainable.

The preceding is taking place simultaneously with a rapid expansion and strengthening of human rights norms applying to indigenous peoples, both as interpreted under existing instruments and as elaborated in emerging instruments. These norms require recognition of and respect for indigenous peoples' rights of ownership, control and peaceful enjoyment of lands, territories and resources traditionally occupied and used and meaningful participation in and consent to decisions and activities that affect their land and resource rights. Indigenous peoples' rights to self-determination, autonomy and self-government, the operation of indigenous legal systems and respect for their political, legal and cultural institutions are also recognized. While these international developments have yet to find their way into national laws across the board, this does not negate the fact that states are required to give effect to human rights obligations in their domestic laws. Establishment and management of protected areas are not exempt for states' human rights obligations as they relate to indigenous peoples.

Similar ideas are found in international environmental law. Article 10(c) of the Convention on Biological Diversity, a treaty ratified by over 171 states, for instance, provides that states shall "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements". Although the precise scope of this Article has yet to be formally articulated, it would most likely include indigenous agriculture, agro-forestry, hunting, fishing, gathering, use of medicinal plants and other subsistence activities. Logically, Article 10(c) must also be understood to include protection for the ecosystems and environment in which customary use of biological resources takes place.

These observations on Article 10(c) are supported by the analysis of the Secretariat of the CBD in its background paper entitled "Traditional Knowledge and Biological Diversity". In that paper, the Secretariat said the following about the language "protect and encourage" found in 10(c):

In order to protect and encourage, the necessary conditions may be in place, namely, security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures of indigenous and local communities, best evidenced by appropriate legislative protection (which includes protection of intellectual property, sacred places, and so on). Discussions on these issues in other United Nations forums have also dealt with the issue of respect for the right to self-determination, which is often interpreted to mean the exercise of self-government.<sup>60</sup>

Violations of indigenous peoples' rights to lands and resources in connection with protected areas give rise to remedies. The right to an effective remedy is itself a human right. Two remedies are of particular relevance: the general remedy for violations, by act or omission, of indigenous peoples' collective land and resource rights and; the right

to restitution of lands, territories and resources taken without indigenous peoples' free and informed consent. The former requires legal recognition of rights to lands traditionally or historically occupied and used, including delimitation, demarcation, both in accordance with indigenous peoples' laws, traditions and customs, and issuance and registration of collective title. Without a freely consented to agreement stating otherwise, the latter requires a return of indigenous lands, territories and resources followed by demarcation and titling. Compensation may also be due, both generally or if returned lands are damaged or if it is impossible to return traditional lands (e.g. lands flooded by a dam). Compensation is specified, in the first place, as lands of equal quality and/or cash and/or services.

There are very few examples of restitution of lands from within protected areas that meet human rights standards. Moreover, in every case where restitution has occurred, it has been the result of many years of struggle by indigenous peoples, in some cases many generations of struggle. Also, the terms of restitution are usually replete with imposed conditionalities, such as lease-back arrangements. This leaves indigenous peoples with very difficult decisions and choices, little negotiating power and some have accepted less than satisfactory arrangements on the basis of "better this than nothing". While indigenous peoples may not be opposed to lease-backs or continued incorporation of their lands in protected areas, the decision should be the result of a process culminating in the consent of the affected indigenous people(s) as a whole.

In this context, it is important to note that, for a variety of reasons, indigenous peoples in many parts of the world are actively seeking protected area status for all or part of their traditional lands and territories. In many cases, they are doing so on condition that their rights are respected and in order to secure additional protection for their territories. International conservation bodies are also discussing amending protected areas categories to account for this possibility. This opens up a potential avenue for reducing conflict, recognizing and protecting indigenous peoples' rights, conserving biodiversity and ensuring increased global benefits provided by protected areas all at the same time.

Through the adoption of various policies and resolutions the IUCN and WWF have both recognized all of the preceding rights and remedies, including the right to restitution. They have done so by explicitly endorsing the rights and principles set forth in ILO 169 and the UN draft Declaration<sup>61</sup> or by recognizing "Indigenous territorial rights as a pre-condition for the management and establishment of protected areas which involve the home lands of Indigenous peoples".<sup>62</sup>

*Resolution 149 on Indigenous Peoples and the IUCN*, adopted at the 1996 World Conservation Congress, IUCN's highest governing body, for example, called upon IUCN members "to consider adoption and implementation of the objectives of ILO Convention No. 169 and the Convention on Biological Diversity, and to comply with the spirit of the draft UN Declaration on the Rights of Indigenous Peoples as well as adopt policies, programmes and laws which implement Chapter 26 of Agenda 21".<sup>63</sup> Furthermore, at its 1994 World Conservation

<sup>61</sup> *Resolutions 1.49-1.52 & 1.54-1.56*, World Conservation Congress, Montreal, Canada, 13-23 October 1996 and; *WWF Statement of principles: indigenous peoples and conservation*, *supra* note 1.

<sup>62</sup> The IUCN Caracas Declaration - protected areas and the human future, 1992.

<sup>63</sup> See, also, Resolution 1.54.

<sup>64</sup> Resolution 19.21. In, Resolutions & Recommendations. 19th Session of the General Assembly of IUCN – The World Conservation Union, Buenos Aires, Argentina, 17-26 January 1994. IUCN: Gland, 1994. See, also, Resolution 19.22 Indigenous People, recognizing ILO Convention No. 169, *ibid.* The following resolutions of World Conservation Congress of 1996 are also pertinent: 1.49 on *Indigenous Peoples and the IUCN* calls upon members ‘to consider the adoption and implementation of the objectives of ILO Convention 169 and the CBD, ‘and comply with the spirit of the UN Draft Declaration on the Rights of Indigenous Peoples. Resolution 1.50 on *Indigenous Peoples, Intellectual Property and Biological Diversity* recognizes ‘the rights of indigenous peoples to their lands and territories and natural resources, as well as their role in management, use and conservation, as a requirement for the effective implementation’ of the CBD. Resolution 1.51 on *Indigenous Peoples and Mineral and Oil Extraction, Infrastructure and Development Works* calls on the IUCN and members to respect the rights of the world’s indigenous peoples, based on the ‘adoption and implementation of the objectives of CBD, ILO 169 and ‘comply with the spirit and principles of the Draft Declaration on the Rights of Indigenous Peoples and Chapter 26 of Agenda 21. Resolution 1.52 on *Indigenous Peoples on Marine and Coastal Areas* recognizes ‘the role and collective interest of indigenous peoples taking into account the terms of the CBD, ILO Convention 169 and the Draft Declaration on the Rights of Indigenous Peoples. Resolution 1.54 on *Indigenous Peoples and Conservation in Meso-America* recognizes ‘the rights of indigenous peoples taking into account the terms of ILO Convention 169, the CBD and the Draft Declaration of the Rights of Indigenous Peoples. Resolution 1.55 on *Indigenous Peoples and Forests* recognizes ‘the rights of indigenous peoples taking into account’ the terms of ILO Convention 169 and the Draft Declaration of the Rights of Indigenous Peoples. Resolution 1.56 on *Indigenous Peoples and the Andes* recognizes ‘the role and collective interest of indigenous peoples taking into account the terms of the CBD, ILO 169 and the Draft Declaration on the Rights of Indigenous Peoples.

<sup>65</sup> *Supra* note 1.

<sup>66</sup> R. Weber, J. Butler & P. Larson (eds.), *Indigenous Peoples and Conservation Organizations: Experiences in Collaboration*. World Wildlife Fund, Washington DC, Feb., 2000, at 14.

<sup>67</sup> J. Beltrán, *supra* note 3, p. 4.

Congress, then known as the General Assembly, IUCN adopted *Resolution 19.21 Indigenous Peoples and the Sustainable Use of Natural Resources*, which explicitly acknowledged indigenous peoples’ right to self-determination as set forth in the International Covenants on Human Rights and declared “its continued commitment to advancing the principles contained in the above cited Conventions and Agreements and to further their integration in the work of IUCN” (see Annex 2). Further resolutions of the World Conservation Congress in 1996 reaffirmed these principles.<sup>64</sup>

WWF has stated that it is “committed to make special efforts to respect, protect, and comply with [indigenous peoples’] basic human rights and customary as well as resource rights, in the context of conservation initiatives. This includes, but is not limited to national and international law, and in other international instruments”.<sup>65</sup> It also “acknowledges indigenous peoples’ right to self-determination” and asserts that it has built its own policies on that right.<sup>66</sup>

However, these rights and remedies, as defined by international human rights instruments and general international law, were not accounted for in the 2000 document of the World Commission on Protected Areas, IUCN and WWF, titled *Indigenous and Traditional Peoples and Protected Areas: Principles and Guidelines*. This is difficult to understand given that they were an attempt to elaborate previous resolutions and policies that not only endorsed ILO 169 and the UN draft, but also declared IUCN’s commitment to advance and incorporate international standards into its work. Also, *Resolution 1.53 Indigenous Peoples and Protected Areas* of the 1996 World Conservation Congress (annex 3), which gave rise to the 2000 *Principles and Guidelines*,<sup>67</sup> specifically called for “the development and implementation of a clear policy in relation to protected areas established in indigenous lands and territories, based on the following principles: (i) recognition of the rights of indigenous peoples with regard to their lands or territories and resources that fall within protected areas . . .”.

Presumably, the rights of indigenous peoples referred to in *Resolution 1.53* should be determined by reference to international law and thus track the points raised in the previous section of this paper. However, the 2000 *Principles and Guidelines* apply a two-tiered system for addressing indigenous peoples’ rights in connection with protected areas: in existing protected areas, these rights are limited to sustainable use rights, whereas in proposed protected areas, indigenous peoples’ collective rights to lands, territories and resources traditionally owned or otherwise occupied and used should be legally recognized (see Annex 4 for text of the relevant language). Although the former may address some of the injustices experienced by indigenous peoples with regard to existing protected areas, particularly those denied access, it does nothing to address the right of indigenous peoples to ownership of their lands, territories and resources traditionally occupied and used nor does it account for the right to restitution or other applicable remedies provided for by a variety of international instruments as well as by general international law.

## **Box**

### **Key Phrases in IUCN Resolutions on Indigenous Peoples (1996)**

Resolution 1.49 on *Indigenous Peoples and the IUCN* calls upon members "to consider the adoption and implementation of the objectives of" ILO Convention 169 and the CBD, "and comply with the spirit of" the UN Draft Declaration on the Rights of Indigenous Peoples.

Resolution 1.50 on *Indigenous Peoples, Intellectual Property and Biological Diversity* recognizes "the rights of indigenous peoples to their lands and territories and natural resources, as well as their role in management, use and conservation, as a requirement for the effective implementation" of the CBD.

Resolution 1.51 on *Indigenous Peoples and Mineral and Oil Extraction, Infrastructure and Development Works* calls on the IUCN and members to respect the rights of the world's indigenous peoples, based on the "adoption and implementation of the objectives of" CBD, ILO Convention 169 and "comply with the spirit and principles of" the UN Draft Declaration on the Rights of Indigenous Peoples and Chapter 26 of Agenda 21.

Resolution 1.52 on *Indigenous Peoples on Marine and Coastal Areas* recognizes "the role and collective interest of indigenous peoples taking into account the terms of" the CBD, ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Peoples.

Resolution 1.53 on *Indigenous Peoples and Protected Areas* calls on the IUCN Secretariat and members to develop and implement a clear policy on protected areas and indigenous peoples based on "recognition of the rights of indigenous peoples to their lands or territories and resources which fall within protected areas".

Resolution 1.54 on *Indigenous Peoples and Conservation in Meso-America* recognizes "the rights of indigenous peoples taking into account the terms of" ILO Convention 169, the CBD and the UN Draft Declaration of the Rights of Indigenous Peoples.

Resolution 1.55 on *Indigenous Peoples and Forests* recognizes "the rights of indigenous peoples taking into account" the terms of ILO Convention 169 and the UN Draft Declaration of the Rights of Indigenous Peoples.

Resolution 1.56 on *Indigenous Peoples and the Andes* recognizes "the role and collective interest of indigenous peoples taking into account the terms of" the CBD, ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Peoples.

## Recommendations

Based on the preceding, the following recommendations are offered:

1 That the 2000 *Principles and Guidelines* be amended, with the meaningful participation of indigenous peoples, to ensure consistency with the rights of indigenous peoples in international law including, among others:

- (a) the full recognition of indigenous peoples' ownership and other rights to lands, territories and resources, including the intergenerational and spiritual aspects of these rights, in existing as well as proposed protected areas;
- (b) to provide that, in cases where indigenous peoples have been deprived of their lands and territories traditionally owned or otherwise occupied and used without their free and informed consent, the right to restitution is triggered and applicable;
- (c) that the right to restitution also applies where indigenous peoples have been relocated from protected areas without their free and informed consent;
- (d) that compensation for damages may be due in cases where indigenous peoples have been relocated or otherwise deprived of their lands, territories and resources without their consent;
- (e) recognition of indigenous peoples' rights to fully and meaningfully participate, through their own freely chosen representatives, in the formulation, implementation and evaluation of national and international conservation policies, procedures and laws; and,
- (f) full respect for rights recognized in treaties and other constructive arrangements concluded between states or their successors and indigenous peoples.

2 That any negotiated settlements or agreements concluded between conservation authorities and indigenous peoples:

- (a) be based upon the fundamental premise that indigenous peoples are the legitimate owners and stewards of their lands, territories and resources traditionally owned or otherwise occupied and used;
- (b) not be subject prior conditionalities;
- (c) include measures to eliminate, to the extent possible, imbalances of power between indigenous peoples and conservation authorities and/or organizations;
- (d) require that indigenous peoples' free and informed consent be obtained in accordance with their own traditions and practices and through their own freely chosen representatives;

3 That IUCN clarify that all six of its current protected area categories can be applied to lands and territories owned and managed by indigenous peoples, subject to their free, prior and informed consent, and calls on governments to revise their national laws to give effect to these possibilities and principles. The IUCN and WCPA should also prepare a programme of work, in collaboration with indigenous

peoples' organisations, to promote the revision of national laws in line with the 1994 categories and to ensure the restitution of indigenous peoples' rights in existing protected areas.

4 That the 2003 V<sup>th</sup> World Congress on National Parks and Protected Areas to be held in Durban, South Africa:

- (a) reaffirm and endorse *Resolution 19.21 Indigenous Peoples and the Sustainable Use of Natural Resources*, adopted by the IUCN General Assembly in 1994;
- (b) demonstrate by other means its support for recognition of and respect for the full range of indigenous peoples' rights in connection with establishment, ownership and management of protected areas; and,
- (c) establish participatory mechanisms to give effect to those rights in all of its policy and operational activities.

5 That the VII<sup>th</sup> Conference of Parties of the Convention on Biological Diversity (CBD) to be held in May 2004:

- (a) issues a formal decision:
  - (i) confirming that recognition of and respect for the rights of indigenous peoples are consistent with and required under Articles 3<sup>66</sup> and 22<sup>67</sup> of the CBD; and,
  - (ii) affirming the commitment of all state parties to the Convention to uphold the rights of indigenous peoples in international law, among others: to freely dispose of their natural wealth and to be secure in their means of subsistence; to ownership, control, peaceful enjoyment and sustainable development of their lands, territories and resources traditionally owned or otherwise occupied and used; to give their free and informed consent to all initiatives and decisions that affect their rights; to be free from involuntary relocation and; to all applicable remedies associated with these rights, including the right to restitution of lands, territories and resources of which they have been deprived without their prior, free and informed consent.
- (b) setting in motion a participatory review of all protected area projects that have been or are being implemented with GEF funding to ascertain their compliance with these principles; and,
- (c) establishing a mechanism to support member countries to carry out the legal reforms required to bring their legislation and policies regarding protected areas into conformity with these principles and to ensure the restitution of indigenous peoples' rights in existing protected areas.

<sup>68</sup> Article 3 of the CBD states that, "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies". As stated by one scholar, the principle of sovereignty over natural resources in international law "includes the duty to respect the rights and interests of indigenous peoples and not to compromise the rights of future generations". N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*. Cambridge: Cambridge University Press 1997, at 391. See, also, *The Convention on Biological Diversity, State Sovereignty and Indigenous Peoples' Rights*. Legal Briefing 1, November 2001, Fern, Forest Peoples Programme, Friends of the Earth International, Greenpeace International and World Rainforest Movement. Available at: [www.fern.org](http://www.fern.org) or <http://forestpeoples.gn.apc.org>

<sup>69</sup> Article 22(1) of the CBD, titled 'Relationship with Other International Conventions' states that: "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".



## **Annex 1**

### **The IUCN Caracas Declaration – protected areas and the human future IV<sup>th</sup> World Congress on National Parks and Protected Areas (1992)**

The IUCN Caracas Declaration - protected areas and the human future, 1992, endorsed several principles relating to the basic rights of indigenous peoples:

- IUCN should recognise Indigenous territorial rights as a pre-condition for the management and establishment of protected areas which involve the home lands of Indigenous peoples;
- IUCN should recognise Indigenous environmental knowledge and traditional management systems as the principal basis for protected areas planning, management and use;
- IUCN should support the documentation and application of Indigenous knowledge and traditional resource management methods;
- IUCN should recognise the important role of women's knowledge and participation in protected area planning, management and use; and
- IUCN should recognise the intellectual property rights of Indigenous peoples and promote appropriate compensation for the provision of services.



## Annex 2

### **IUCN Resolution 19.21 (1994) – Indigenous People and the Sustainable Use of Natural resources**

**ACKNOWLEDGING** the major international Covenants of 1966 on Civil and Political Rights, and on Economic, Social and Cultural Rights, according to which no people may under any circumstances be deprived of its means of subsistence;

**RECALLING** that the 1992 UN Conference on Environment and Development, in Chapter 26 of Agenda 21, recognized the valuable role of indigenous peoples and local communities in maintain sustainable use of nature's resources and underlines, in Principle 22 of the Rio Declaration on Environment and Development, the importance of the active participation of indigenous people in environmental management;

**CONSCIOUS** of the conclusions in the World Commission on Environment and Development report of 1987 on the need for empowerment of vulnerable groups to promote citizen participation in sustainable development;

**COGNIZANT** of the International Labour Organisation Convention No. 169 which lends support to the special relationships that exist between indigenous people and nature;

**NOTING** that the United Nations has begun preparation of a Draft Universal Declaration on the Rights of Indigenous People and has declared the Decade of Indigenous People;

The General Assembly of IUCN – The World Conservation Union, at its 19<sup>th</sup> Session in Buenos Aires, Argentina, 17-26 January 1994:

- 1 **DECLARES** its continued commitment to advancing the principles contained in the above cited Conventions and Agreements and to further their integration in the work of IUCN;
- 2 **CALLS** upon governments, and especially State members of IUCN, to recognize and give effect in their national polices and programmes for sustainable use and development to the principles relating to indigenous people contained in the Covenants and Agreements cited above.



## Annex 3

### **IUCN World Conservation Congress, Resolution 1.53 – Indigenous Peoples and Protected Areas, October 1996**

**RECALLING** that some protected areas have been established on indigenous lands and territories without the consent and participation of the affected people;

**CONSIDERING** the terms of ILO Convention No. 169 and those of the Convention on Biological Diversity, regarding the role of indigenous peoples with respect to the management, use and conservation of biodiversity;

**CONSIDERING** the recommendations and guidelines established in Agenda 21;

**CONSIDERING** the emphasis placed in Caring for the Earth on the role of indigenous peoples in sustainable development and their rights in the management of natural resources;

**CONSIDERING** the recommendations of the IV<sup>th</sup> World Congress on National Parks and Protected Areas, calling for the development of policies for protected areas which safeguard the interests of indigenous peoples;

**RECOGNIZING** that several governments have already adopted policies and measures to fully incorporate the rights and interests of indigenous peoples in the establishment and management of protected areas within their lands and territories;

#### **The World Conservation Congress at its 1st Session in Montreal, Canada, 14-23 October 1996:**

- 1 **REQUESTS** the Director General, the Secretariat and technical programmes, Commissions, members and Councillors of IUCN, within available resources, to endorse, support, participate in and advocate the development and implementation of a clear policy in relation to protected areas established in indigenous lands and territories, based on the following principles:
  - (i) recognition of the rights of indigenous peoples with regard to their lands or territories and resources that fall within protected areas;
  - (ii) recognition of the necessity of reaching agreements with indigenous peoples prior to the establishment of protected areas in their lands or territories;
  - (iii) recognition of the rights of the indigenous peoples concerned to participate effectively in the management of the protected areas established on their lands or territories, and to be consulted on the adoption of any decision that affects their rights and interests over those lands or territories.

- 2 **URGES** all IUCN members to establish appropriate mechanisms at the national level, for the development and implementation of policies on protected areas and indigenous peoples that are consistent with these principles.
- 3 **REQUESTS** the World Commission on Protected Areas to establish closer links with indigenous people's organizations, with a view to incorporating the rights and interests of indigenous peoples in the application of the IUCN Protected Area Management Categories.
- 4 **REQUESTS** the Director General, within available resources, to incorporate in IUCN's work on protected areas and natural heritage, specific actions aimed at ensuring the further development and implementation of appropriate policies based on these principles.

## Annex 4

### **IUCN/WCPA/WWF, Principles and Guidelines on Protected Areas and Indigenous/Traditional Peoples (2000)<sup>e</sup>**

#### **Principle 2**

*Agreements drawn up between conservation institutions, including protected area management agencies, and indigenous and other traditional peoples for the establishment and management of protected areas affecting their lands, territories, waters, coastal seas and other resources should be based on full respect for the rights of indigenous and other traditional peoples to traditional, sustainable use of their lands, territories, waters, coastal seas and other resources. At the same time, such agreements should be based on the recognition by indigenous and other traditional peoples of their responsibility to conserve biodiversity, ecological integrity and natural resources harboured in those protected areas.*

#### **Guidelines**

- 2.1 Agreements between representatives of the respective communities and conservation agencies for the establishment and management of protected areas should contribute to securing indigenous and other traditional peoples' rights, including the right to the full and effective protection of their areas, resources and communities. At the same time, such agreements should define the responsibilities of both parties to conserve and sustainably manage the resources of those communities, and which protected areas are intended to safeguard;
- 2.2 As part of the development of such agreements, the following indigenous and other traditional communities' rights should be respected in relation to the lands, territories, waters, coastal seas and other resources which they traditionally own or otherwise occupy or use, and which fall within protected areas:
  - a) rights with regard to sustainable, traditional use of their lands, territories, waters, coastal seas and other resources that fall within protected areas,
  - b) rights to participate in controlling and managing their lands, territories, waters, coastal seas and other resources, in compliance with agreed management regulations and plans,

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<sup>e</sup> Source: Javier Beltran (ed.) *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*. WCPA and IUCN, Gland, 2000, pp. 7-8.

- c) rights to participate in deciding on issues, such as technologies and management systems, affecting their lands, territories, waters, coastal seas and other resources, subject to agreed management regulations and plans,
- d) rights to participate in determining priorities and strategies for the development or use of their lands, territories, waters, coastal seas and other resources, in the context of agreed management regulations and plans,
- e) rights to use their own traditional institutions and authorities to co-manage their terrestrial, coastal/marine and freshwater areas, as well as to defend them from external threats, subject to agreements with the agencies in charge of national protected area systems,
- f) rights to require that States obtain the free and informed consent of the respective communities, prior to the approval of any project affecting their lands, territories, waters, coastal seas or other resources,
- g) rights to improve the quality of their lives, and to benefit directly and equitably from the conservation and ecologically sustainable use of natural resources contained in their terrestrial, coastal/marine and freshwater areas,
- h) collective rights to maintain and enjoy their cultural and intellectual heritage, particularly the cultural patrimony contained in protected areas, and the know-ledge related to biodiversity and natural resource management,
- i) rights not to be removed from the zones they have traditionally occupied within protected areas. Where their relocation is considered necessary as an exceptional measure, it should take place only with the free and prior, informed consent of the indigenous and other traditional peoples affected, and with appropriate compensation;

2.3 The establishment of new protected areas on indigenous and other traditional peoples' terrestrial, coastal/marine and freshwater domains should be based on the legal recognition of collective rights of communities living within them to the lands, territories, waters, coastal seas and other resources they traditionally own or otherwise occupy or use;

2.4 However, since legal recognition of rights does not fall within the mandate of protected area managers, managers should promote interim arrangements with the respective indigenous and other traditional communities. Such arrangements, while fully respecting the rights and claims of such peoples and communities, and not interfering with the respective legal processes underway to determine these, should ensure that protection measures are put quickly into place, based where needed on management or co-management agreements;

2.5 In cases where indigenous and other traditional peoples' rights within protected areas are not yet recognised by a government, and until the process leading towards such recognition is completed, the concerned communities should still be guaranteed access to the resources existing in their terrestrial, coastal/marine and freshwater areas, insofar as they are necessary for their livelihoods. Any access restrictions should be agreed on with the communities concerned, and appropriate compensation should be given in cases where such restrictions are considered necessary by all parties, to ensure appropriate conservation of the resources contained within the protected area.



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